89-96

Supreme Court, U.S.
FILED
JUL 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES MILBURN, JR., a minor, by Charles B. Milburn, his father and next friend,

*Petitioners,*

v.

ANNE ARUNDEL COUNTY DEPARTMENT OF SOCIAL SERVICES,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review by the Court:

1. Whether a child who is placed in a foster home by the State is entitled to the protection of the Due Process Clause when the State through reckless and grossly negligent misconduct fails to protect the child from abuse by the foster parents selected by the State.

2. Whether the foster parents are state actors for the purposes of 42 U.S.C. § 1983, in any event.

## LIST OF ALL PARTIES

Petitioner: Charles Milburn, Jr.

Respondents: Anne Arundel County, Maryland, a Municipal Corporation; Anne Arundel County Department of Social Services (DSS); Ester Carpenter, individually and as the former Director of DSS; Elizabeth Tyler, individually, and as Supervisor of DSS; Judith F. Plymyer, individually and as Caseworker of DSS; Sergio Alvarez, M.D., employee of North Arundel Hospital Association, Inc.; North Arundel Hospital Association, Inc., a Maryland Corporation; Hazel Gent, employee of North Arundel Hospital Association, Inc.; Karl T. Tucker, foster father; Wendy L. Tucker, foster mother; Baltimore City Hospitals.

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## OPINIONS BELOW

1). By Order dated October 19, 1987, the United States District Court for the Fourth Circuit adopted (for different reasons) the recommendations of the Magistrate to dismiss Petitioner's Complaint, based on Motions To Dismiss filed by each Defendant.

2). The Court of Appeals for the Fourth Circuit heard argument on the appeal on November 1, 1988 and on March 31, 1989 rendered its opinion affirming the judgment below. The judgment and opinion of the Court of Appeals is reported at 871 F.2d 474 (4th Cir. 1989).

3). Thereafter, Petitioner filed a Motion for Rehearing which was denied by Order on April 21, 1989. The judgment and opinion of the Court of Appeals as well as the order of the Court of Appeals denying rehearing are reproduced verbatim in the Appendix.

## STATEMENT OF GROUNDS OF JURISDICTION IN THIS COURT

a). Petitioner seeks review of the judgment of the Court of Appeals for the Fourth Circuit which was entered on March 31, 1989.

b). The Court of Appeals for the Fourth Circuit entered its Order denying rehearing on April 21, 1989. No order has been granted extending the time within which to petition for certiorari.

c). The Court has jurisdiction to review the judgment of the Court of Appeals for the Fourth Circuit by Writ of Certiorari under 28 U.S.C. § 2101.

## CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF THE CASE

By this Petition, this Court is asked to review a decision of the United States Court of Appeals for the Fourth Circuit which held that there was no duty on the part of the State to intervene to protect petitioner, Charles Milburn, Jr. (Charles) from his foster parents, the very foster parents the State had selected and that the foster parents were not state actors.

Charles was born on July 8, 1969. On June 10, 1971, when Charles was 23 months old the

respondent, Anne Arundel County Department of Social Services (DSS) placed the infant in the foster home of respondents, Karl T. Tucker and Wendy L. Tucker, his wife (Tuckers). Earlier on April 29, 1971, the Tuckers signed a Foster Parents Agreement with DSS. See Appendix page 27a. The Foster Parents' Agreement was attached to the Complaint filed in the District Court and incorporated therein. The Foster Parents Agreement stated that ". . . the *custody* and control of the child at all times remains in the *department*." (Emphasis added) Indeed, the District Court below found custody of petitioner to be in the State when deciding the Motions To Dismiss. See Appendix, page 22a. Charles' parents did not object to the State assuming custody of their son. The Agreement signed by DSS and the Tuckers also provided, that DSS ". . . [would] provide board, medical care clothing, and supervision of the child during his placement." On May 14, 1971, DSS by its Director, respondent, Ester H. Carpenter, executed an Agency Home Approval form certifying that the Tuckers' home met the standards for agency homes as defined by the rules of the Maryland State Department of Social Services.

Not only did the Foster Parents' Agreement require that DSS supervise all foster child placements but, in addition, Maryland Agency Rules and Regulations 7.02.11.01 *et. seq.* required supervision of foster child placements by DSS.

It was into this setting that DSS placed Charles, at the age of 23 months, into foster care and into the hands of the Tuckers on June 10, 1971.

From June 10, 1971, until May of 1973, the respondent, Wendy L. Tucker, subjected Charles to

child abuse by way of aggravated assault and battery and the respondent, Karl T. Tucker, failed to report the abuse which he knew or, in the exercise of care, should have known. Charles received the following injuries while living in the foster home of the Tuckers:

a. On or about January, 20, 1972, he suffered multiple bruises and a fracture of the femur of the right leg with massive hematoma.

b. On or about November 13, 1972, he suffered a deep laceration over the left eye.

c. On or about January 12, 1973, he suffered severely burned hands leaving him with permanently disfiguring scars and permanent disability.

d. On or about May 1, 1973, he suffered a fracture of the tibia of the left leg.

With respect to the incident of January 20, 1972, Charles was treated by the respondent, North Arundel Hospital. North Arundel Hospital forwarded to DSS a report entitled "Report of Suspected Child Abuse." In this report, North Arundel Hospital advised DSS that the child had been admitted not only with a fractured femur but, also, with numerous bruises. It was further noted in the report: "Child displays fear of foster mother."

Additional records from the North Arundel Hospital disclosed that the supervisor of nurses respondent, Hazel Gent, on February 28, 1972, talked by telephone with the Director of DSS respondent, Ester Carpenter, and reported to her that Charles had been admitted with many bruises and that he displayed a fear of the foster mother, Wendy L. Tucker.

Despite the above warnings, said respondent, Ester Carpenter, and respondents, Elizabeth Tyler and Judy Finn (now Judy F. Plymyer) the supervisor and the case worker respectively assigned to Charles' placement in foster-care, failed to investigate the facts and displayed gross negligence and deliberate indifference to Charles' welfare by simply continuing to allow Charles to remain in the Tucker foster home where Charles suffered further injuries on November 13, 1972, January 12, 1973, and May 1, 1973, as above outlined.

With respect to the incident of January 12, 1973, Wendy L. Tucker assaulted Charles by immersing his hands in boiling water. As a result, Charles suffered severe burns to his hands and wrists. On or about January 13, 1973, the caseworker, Finn, learned of the burns but failed to investigate the incident. Neither Finn nor the Tuckers sought medical treatment for Charles. On January 13, 1973, Wendy L. Tucker told Finn that Charles' hands and wrists were very red and that blisters had appeared but that she did not want to take Charles to the doctor for fear of being accused of child abuse. At that time, Wendy L. Tucker told Finn that she had taken Charles to her regular pediatrician for head injuries just a few weeks before and said that previously she had taken her own son to the same pediatrician for head injuries and was now afraid of being accused of child abuse.

Finn and Wendy L. Tucker agreed that Wendy L. Tucker would treat Charles' burns at home. On January 29, 1973, Charles, now desperately ill from the effects of his burns, had to be rushed to Baltimore City Hospital for surgery. The 17-day delay in seeking professional medical care caused the muscles of each

of Charles' hands to contract severely, requiring several operations and resulting in severe permanent damage, with disfiguring scars, to his arms and hands.

Physicians who treated Charles, at Baltimore City Hospitals, urged respondent Finn not to return him to the Tucker home; however, upon Finns' recommendation, and that of Tyler and Carpenter, Charles continued to live with the Tuckers. On or about May 1, 1973, Charles suffered a fracture of the tibia of the left leg. After an extended hospital stay, DSS removed Charles from the Tuckers' foster care, on or about August 21, 1973, and Charles was placed in another foster home where he lived free from harm.

## BASIS OF ORIGINAL FEDERAL JURISDICTION

The basis of original federal jurisdiction was 42 U.S.C. § 1983 creating petitioner's cause of action.

## ARGUMENT

Presented here is the question of whether a child, who is placed in a foster home by the State, is entitled to protection when the State, through gross negligence and deliberate indifference, fails to intervene to protect the child from abuse by the very foster parents selected by the State.

The Court should grant Certiorari for these reasons:

(1) This Court itself in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ___, 103 L.Ed.2d 249, 109 S.Ct. ___ (1989), noted that a child in State custody may be able to claim that there is an affirmative duty of protection by analogy to incarceration and institutionalization under *Estelle v.*

*Gamble*, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976) and *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982) respectively. The Court noted, in footnote No. 9 of *DeShaney, supra*, that the analogy may be appropriate but expressed no view on its validity since custody of Joshua DeShaney was in his father while he (Joshua) was harmed. The question is squarely before the Court in the case at bar, however, since the State assumed custody of Charles and placed Charles in the Tucker foster home where he was harmed by the Tuckers.

(2) The Court of Appeals wrongly concluded that the foster parents were not state actors for the purposes of 42 U.S.C. § 1983.

(3) The question presented is extremely important to the child care agencies and to the untold numbers of children in foster care who may be at risk.

**I. This Petition for Certiorari Should Be Granted Because This Court Recently, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ___, 103 L.Ed.2d 249, 109 S.Ct. ___ (1989), Noted the Appropriateness of Deciding the Issue Presented by the Case at Bar Which Was Not Presented by *DeShaney, supra*.**

Several Courts of Appeal have held that the State is liable under the Due Process Clause for failing to protect children placed by the State in foster homes from mistreatment at the hands of their foster parents. *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), *Doe v. New York City Dept. of Social Services* ("Doe II"), 709 F.2d 782 (2d Cir.) *Cert. den.* sub nom. Catholic Home Bureau v. Doe, 464 U.S. 864 (1983), *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) *Cert. den.*

109 S.Ct. 1006 (1989). That same question was presented to the Court below. However, the Court below ruled that there was no duty to intervene to protect petitioner from abusive foster parents, the Tuckers, even though the State placed the petitioner in the foster home of the Tuckers. The Court of Appeals relied on *DeShaney, supra*, as dispositive of the issue although the Court of Appeals failed to explain why *DeShaney, supra*, applies to foster care cases. In fact, the case at bar and *DeShaney, supra*, are distinguishable. In *DeShaney, supra*, Joshua DeShaney was not in State custody during the period he was injured, whereas petitioner, Charles, was in State custody at the time he was injured. The fact that petitioner was in State custody puts him in a situation analogous to Nicholas Romeo in *Youngberg v. Romeo, supra*, which held that involuntarily committed mentally retarded persons had a right to State protection from physical violence inflicted by third parties. Prisoners are also constitutionally entitled to protection by state officials. See *Estelle v. Gamble, supra*. Petitioner in the case at bar was only 23 months old when he entered foster care. Petitioner entered foster care for assistance, not because he was being punished. Helpless, innocent children in foster care should receive, at a minimum, the same protection as those incarcerated for criminal wrongdoing.

The fact that petitioner's parents may have consented to his being in foster care is irrelevant as a similar consent to institutionalization was irrelevant to Nicholas Romeo, who was involuntarily committed to a state hospital on a petition brought by his mother.

Being in State custody and living in a foster home, as petitioner did, is more similar to institutionalization

than to living with a parent which was Joshua DeShaney's situation. Petitioner lacked the ability to protect himself and was totally dependent upon his State custodians to protect him from abusive foster parents. In fact, the State's own contract with the foster parents in the case at bar is structured to protect petitioner and to regulate the relationship with the foster parents and provides that the custody and control of the child at all times remains in the department (DDS); that the department will provide board, medical care, clothing and supervision of the child during his placement; that visiting and communication between the child and his own family will be arranged by the department; that the child is being placed in the foster home for an indefinite time; that the department reserves the right to remove the child at its discretion and shall remove the child at the request of the foster parents; that the child may not be moved from the foster home without written permission of the department; that the foster parents will take no action for adoption or guardianship of any child without the department's consent in writing. These regulations reveal the extent to which the State should intervene in the lives of children in foster care for the purpose of protecting them and are prime reasons why this case is distinguishable from *DeShaney, supra.*

Since the state had custody they could have placed petitioner in another type of facility such as a group home or institution. The fact that Charles was in a foster home rather than an institution should not deprive him of the right to protection, since his State custodians were the ones who chose one type of setting for him rather than another.

Finally, in *DeShaney, supra*, the State defendants were sued for failing to take any action to remove Joshua from the custody of his father. Here, the State respondents did act. The State respondents placed Charles in a position of danger by placing him in the Tucker foster home and failing to remove him from that home.

In *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir. 1987), the Court of Appeals recognized that the Department of Social Services would be liable if *it* had placed Joshua DeShaney in a position of danger, citing *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *White v. Rochford, supra*, the State was held liable under § 1983 when a man was arrested by police for drag racing on a busy highway and police left young children in the car alone causing them to be injured. See also *Jamieson v. Shaw*, 772 F.2d 1204 (5th Cir. 1985) for the proposition that the State is liable under 42 U.S.C. § 1983 when the State placed innocent persons in a position of danger (police erected a road block to stop a speeding suspect; ensuing crash injured an innocent passenger.) For other cases where the "place in danger" theory of liability has been adopted in § 1983 cases see *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988) and *Wideman v. Shallowford Community Hospital, Inc.* 826 F.2d 1030 (11th Cir. 1987). See also *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974). The distinction between the State placing an innocent person in a position or place of danger and failing to intervene (which could lead to liability) and failing to intervene to protect a person the State did *not* put in a place or position of danger (which may not lead

to liability) is set forth in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982).

**II. This Petition for Certiorari Should Be Granted Because the Court of Appeals Wrongfully Decided That the Foster Parents Were Not State Actors for the Purposes of 42 U.S.C. § 1983.**

To state a claim under § 1983 a petitioner must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, ___ U.S. ___ , 101 L.Ed.2d 40, 108 S.Ct. 2250 (1988). To constitute state action, the deprivation must be caused by the exercise of a right or privilege created by the State or by a person for whom the State is responsible and the person charged with the deprivation must be said to be a state actor. *West v. Atkins, supra.* In *West v. Atkins, supra*, the Court held that a physician in private practice, who provided medical treatment to prisoners under a contract with the State, acted under color of state law when he treated prisoners.

DSS, in order to fulfill its obligation to provide care for neglected children entered into a contract with the Tuckers as foster parents. By virtue of this contract the Tuckers were authorized and obligated to take care of the petitioner. The Tuckers took petitioner into their home clothed with the authority of state law. Thus, the Tuckers were persons who may fairly be said to be state actors. *Lugar v. Edmonson Oil Co.*, 457 U.S. 937, 73 L.Ed.2d 482. 102 S.Ct. 2744 (1982).

Charles could only turn to the Tuckers for care because the State exercised its right to place Charles

in the Tucker foster home. Charles was thus denied a venue independent of the State to obtain care as Quincy West was denied another venue to obtain medical treatment. The State delegated the function of providing care for Charles to the Tuckers and the Tuckers voluntarily assumed that obligation by contract. The Tuckers were thus vested with the State's authority to fulfill the State's duty of providing care to Charles. If the Tuckers misused their power over Charles the deprivation was caused in the sense relevant for state-action inquiry by the State placing Charles in the Tucker foster home where he could only look to the Tuckers for care. The State and the Tuckers were joint participants, and the Tuckers must be considered to be state actors. *Lugar v. Edmonson Oil Co., supra.*

**III. This Petition for Certiorari Should Be Granted Because a Resolution of This Issue Will Help Define the Nature and Extent of the Responsibility of Those Working in the Foster Care Field and Will Aid Children Who May Be Endangered.**

Because those working in the foster care field cannot be certain of their liability under § 1983 for failure to intervene to protect a child placed in foster care by the State, a decision by this Court on the question will assist child protection agencies when deciding when to intervene in a particular case so as to avoid liability. Finally, those children in state custody who are being abused by foster parents will be able to invoke § 1983 for protection.

## CONCLUSION

For the reasons noted, resolution by this Court of the questions presented is both appropriate and urgent. Therefore, the Writ of Certiorari should issue.

Dated this 18th day of July, 1989. CHARLES MILBURN, JR., Petitioner.

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# APPENDIX

# PUBLISHED

UNITED STATES COURT OF APPEALS
**For The Fourth Circuit**

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**No. 88-3916**

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CHARLES MILBURN, JR., a minor, by Charles B. Milburn, his father and next friend,

*Plaintiff-Appellant,*

versus

ANNE ARUNDEL COUNTY DEPARTMENT OF SOCIAL SERVICES; ESTHER CARPENTER, individually, and as the Former Director of Anne Arundel County Department of Social Services; ELIZABETH TYLER, individually, and as Supervisor, Anne Arundel County Department of Social Services; SERGIO ALVAREZ, M.D.,; NORTH ARUNDEL HOSPITAL, a Maryland Corporation; HAZEL GENT; WENDY L. TUCKER; KARL T. TUCKER; BALTIMORE CITY HOSPITALS; ANNE ARUNDEL COUNTY, MARYLAND, a Municipal Corporation; JUDITH F. PLYMYER, individually, and as Caseworker, Anne Arundel County Department of Social Services,

*Defendants-Appellees.*

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**Appeal from the United States District Court for the District of Maryland, at Baltimore.**
**Joseph C. Howard, District Judge.**
**(CA-83-2857-JH)**

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**Argued November 1, 1988**
**Decided March 31, 1989**

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**Before WIDENER, CHAPMAN, and WILKINS, Circuit Judges.**

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Vincent Anthony Mulieri for Appellant. Ralph S. Tyler, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General, on brief); Ronald Gordon Dawson (A. Gwynn Bowie, Jr., SMITH, SOMERVILLE & CASE, on brief); Deborah Sweet (WHITEFORD, TAYLOR & PRESTON; Barry J. Henderson, Richard C. Burch, MUDD, HARRISON & BURCH; Guerdon Macy Nelson, Elijah Dale Adkins III, ANDERSON, COE & KING; Neal M. Janey, City Solicitor, William R. Phelan, Jr., Special Solicitor; Davis Samuel Bliden, Deputy County Solicitor, on brief) for Appellees.

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WIDENER, Circuit Judge:

Charles Milburn appeals the decision of the district court dismissing his complaint against both the public and private defendants. As the complaint does not support a cause of action, we affirm.

Milburn was voluntarily placed by his parents in a foster home through the state placement system at the age of 23 months. The Maryland Department of Social Services placed him in the licensed foster home of Karl and Wendy Tucker, where he remained from June 10, 1971 until August of 1973.

During the period of time which he spent in the Tucker home, Milburn sustained significant injuries on four separate occasions for which he needed medical treatment. In January of 1972, Milburn was treated at North Arundel Hospital for multiple bruises and a fracture of the right femur. The hospital personnel who treated Milburn reported to the Department of Social Services (DSS) in writ-

ing that the injuries aroused their suspicion of suspected child abuse. The report detailed the child's injuries and that he displayed fear of the foster mother. Defendant Hazel Gent, a nurse at the hospital, communicated over the telephone to defendant Esther Carpenter, Director of DSS, the same concerns noted in the written report.

In November of 1972, plaintiff was treated for a deep laceration over the left eye. In January of 1973, an incident occurred in the foster home in which the plaintiff's hands were severely burned. The caseworker, Judy Finn (now Judy F. Plymyer), learned of the injury during a visit to the home the following day. Miss Finn allowed Mrs. Tucker to treat the burns at home. When the child became in need of further medical treatment for those burns several weeks thereafter, he was taken to Baltimore City Hospital for surgery on his hands and wrists resulting in permanent disfigurement. The hospital employees who treated Milburn suggested that the injuries were the result of child abuse, and it is now alleged Milburn's hands were immersed in hot water by the Tuckers as punishment. However, upon recommendation of defendants Finn, Carpenter and Elizabeth Tyler of DSS, Milburn was returned to the Tucker home. Subsequently, in May 1973, Milburn suffered a broken tibia. In August of 1973, Milburn was placed in a different foster home.

A complaint was filed on August 5, 1983 by Charles Milburn, Sr. as the father and next friend of the plaintiff. The complaint under 42 U.S.C. § 1983 alleges that the defendants violated plaintiff's rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments based on continued and negligent care and placement in the home of the Tuckers. The complaint further alleges violations of state and other federal law. All of the defendants filed motions to dismiss.

A hearing was held before a magistrate on the defendants' motions. The magistrate, in a thorough mem-

orandum opinion, recommended that the motions of the defendants be granted. Plaintiff filed exceptions to the magistrate's report, and the district court, after a review of those claims to which exception was taken, adopted the magistrate's recommendation of dismissal, albeit for somewhat different reasons on some issues. Milburn appeals.

Milburn's principal contention is his claim filed under 42 U.S.C. § 1983.[1] He sued Karl T. Tucker and Wendy Tucker, his wife, the foster parents. He also sued Anne Arundel County, Maryland; Anne Arundel County Department of Social Services (DSS) and Esther Carpenter, Judy Finn Plymyer, and Elizabeth Tyler, officers or employees of DSS; North Arundel Hospital Association, Inc., and Hazel Gent, a nurse, and Sergio Alvarez, a physician, employees of North Arundel Hospital Association; Baltimore City Hospitals and Eduardo Mazzi, Ophelia Janes, physicians, and Maryland Hartge, employees of Baltimore City Hospitals. It is acknowledged that North Arundel Hospital is a private entity and Baltimore City Hospitals are a part of the municipality.

The facts giving rise to the cause of action against the various defendants are that Tucker and wife badly abused Milburn as a child while Milburn was in their care as foster parents. He alleges that the Department of Social Services and Anne Arundel County and the employees of DSS displayed gross negligence and deliberate indifference to his welfare in that they continued his placement in the foster home of the defendants Tucker. The Hospital defendants and their employees are charged with much the same type

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[1] The plaintiff also contends that the district court erred in holding that he failed to state a claim under 42 U.S.C. § 608(f) which is a part of the AFDC program. The district court held that § 608(f) did not apply because there was no judicial determination which removed the child from the home of its parents. We agree with the district court. We are also of opinion the district court did not abuse its discretion in declining to permit an amendment to the complaint some two years following the issuance of the magistrate's report.

of cause of action. It is charged that they either failed to report the abuse of the plaintiff in the manner provided by law or failed to adopt procedures for such reporting.

After this case was argued before us, the Court decided *Deshaney v. Winnebago County Department of Social Services*, 57 L.W. 4218 (Feb. 22, 1989), which is dispositive of most of the issues in this case. Other than the fact that it was one of the natural parents in *Deshaney* who administered the physical child abuse, as opposed to the foster parents here, the essential facts of *Deshaney* and this case are indistinguishable.

In *Deshaney*, the father had severely beaten the child. The child and his mother brought suit under 42 U.S.C. § 1983 against Winnebago County, Wisconsin, its Department of Social Services, and various individual employees of the department. The complaint alleged a loss of liberty under the Fourteenth Amendment by their failure ". . . to intervene to protect . . . [the child] against a risk of violence at his father's hands, of which they knew or should have known." 57 L.W. at 4219. So, the cause of action is essentially the same as pleaded here against all of the defendants except the Tuckers, the foster parents.

The Court described the cause of action as ". . . failing to provide . . . [the child] with adequate protection against his father's violence," 57 L.W. 4219, again essentially the same claim which is asserted here.

Despite the fact that the defendants in *Deshaney* were subdivisions of the State or employees thereof, the Court held that no cause of action was stated against the defendants under § 1983. "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 57 L.W. at 4220. The Court reasoned that when the State, by the affirmative exercise of its power, so restrains an individual's liberty that it renders him unable to care for himself and at the

same time fails to provide for his basic human needs, food, clothing, shelter, medicinal care and reasonable safety, the State transgresses the substantive limits set by the Eighth Amendment and the Due Process Clause. But the Court reasoned that that analysis simply had no application in the case because the injuries suffered by the child "... did not occur while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." [Footnote omitted] The Court recited that while the State may have been aware of the dangers faced by the child, it played no part in their creation nor did it do anything to render him any more vulnerable to them. 57 L.W. at 4221. And, in note 9, at p. 4221, omitted from the last quotation above, the Court stated that had the State by the affirmative exercise of its power removed the child from free society and placed him in a foster home operated by its agents, a different situation might obtain, but the Court went on to say it expressed no opinion on the validity of that analogy, for it was not before the Court.

Applying *Deshaney* to the facts of this case, we are of opinion that a cause of action is not stated against the hospital and county and municipal defendants and their employees. The most that any of them might have been charged with was a failure to protect the plaintiff against private violence. The State of Maryland by the affirmative exercise of its power had not restrained the plaintiff's liberty; he was voluntarily placed in the foster home by his natural parents. And the injuries to the plaintiff did not occur while he was in the custody of the State of Maryland, rather while he was in the custody of his foster parents, who were not state actors, as we will demonstrate below.

Whether the Tuckers are state actors depends on the facts of the case, as it must in each instance, see *Burton*, infra, p. 726, and upon the case law commencing with *Burton v. Wilmington Parking Authority*, 365 U.S. 715

(1961), in which the Court decided that for a private party to fall within the scope of § 1983 as a state actor, the State must have so far insinuated itself into a position of interdependence with the charged party that it must be recognized as a joint participant in the challenged activity which, on that account, cannot be considered to have been so "purely private." 365 U.S. at 725. For the relationship of the State to the Tuckers, the plaintiff depends on only a contract his foster parents signed with Anne Arundel County Department of Social Services, an agency home approval of the Tuckers home as a foster home for two children, and the Maryland statutes, Article 27, § 35a (1970), as that statute relates to reporting the suspected child abuse of the plaintiff. Significantly, the plaintiff depends on no other Maryland statute. The position of plaintiff is succinctly stated in his brief that the Tuckers were state actors because ". . . the State produced the foster parents through its licensing procedure and promised to supervise the placement of the plaintiff in the Tuckers foster home." Brief, p. 25. The contract, however, provided only the most general guidelines for the Tuckers foster home and that DSS would provide board, medical care, clothing and supervision of the child during his placement. It did not provide, and it is nowhere alleged, that the Tuckers received any compensation for their services as foster parents. The contract did not provide, either in general or in detail, for any conduct of the foster parents in their home with respect to the foster child, and all day to day parenting decisions were left to the foster parents. The approval of the Tuckers' home was in very nearly the briefest possible form and merely stated that the home meet the standards as defined by the rules of the Maryland State Department of Social Services. So, neither the contract nor the approval form provides for any kind of intimate relationship between the State and the Tuckers, nor is there any detailed guidance of the Tuckers nor any regulation of the conduct complained of.

Following *Burton*, the Court decided *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In that case, discharged employees sought to maintain a § 1983 cause of action against a regulated utility on the ground that the utility was a state actor. The Court held that the utility was not a state actor and reasoned, on p. 350, that the ". . . mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." [Footnote omitted] The Court stated that ". . . the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351. The Court further reasoned that the case might have been different if it were dealing with the exercise by the utility of some power traditionally associated with sovereignty, 419 U.S. at 353, and the fact that regulation of the utility was extensive and detailed did not by itself convert its action into that of the State. 419 U.S. at 350.

The Court again considered the question in three cases in 1982, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

*Kohn* was a case involving a private school which specialized in dealing with students who had experienced difficulty completing public high schools. Many of the students had drug, alcohol or behavioral problems, and the school was extensively regulated and funded by the State of Massachusetts, although it retained its private character, and its directors were not public officials or chosen by the State. The school discharged some of its teachers and in the ensuing suit, on account of that discharge, the teachers claimed under § 1983 that the act of the school was the act of the State. The Court held that the school was not subject to suit under § 1983 and that the ultimate issue in such cases was ". . . is the alleged infringement of fed-

eral rights 'fairly attributable to the State?' ", quoting from *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The Court based its decision on its construction of *Jackson* ". . . that the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State' ", quoting from *Jackson*, at 353. (Italics in original) Despite the fact that the education of maladjusted high school students was a public function, because such education was not the exclusive province of the State, the Court gave that as a principal reason for deciding that the school was not a state actor. It also considered the other factors mentioned in *Blum* which we now address.

*Blum* involved nursing homes which transferred or discharged a class of medicaid patients without notice or an opportunity for a hearing, and the question was whether the nursing homes, acting in cooperation with the State of New York, which reimbursed them for the reasonable cost of the health care of the patients involved, were responsible for such discharges or transfers under § 1983 as the acts of the State. The nursing homes, in addition to receiving apparently all of their income involved there from the patients also involved there, were extensively regulated. The Court held that the conduct of the nursing homes was not state action for the purposes of § 1983. The Court set out a three-step analysis necessary to resolve the case. First, with respect to the extensive regulation, the Court held that regulation by itself was not enough, but that there had to be a sufficiently close nexus between the State and the challenged action so that the action of the actor might be fairly treated as that of the State. The Court continued that consitutional standards are invoked ". . . only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." 457 U.S. at 1004. (Italics in original) Second, while the facts will vary from case to case, a State normally will not be responsible for a private decision unless it has exercised coercive power or has provided such sig-

nificant encouragement, either overt or convert, that the choice in law must be deemed that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives. 457 U.S. 1004-1005. "Third, the required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State' ", quoting from *Jackson*, at 353. 457 U.S. at 1005. The Court applied the facts of that case and found state action not present. The Court found that the decisions to transfer or discharge were that of the physicians involved, not the State, and thus were the decisions of private parties. It further found that the decisions involved were not those traditionally and exclusively made by the sovereign.

Subsequent to these cases, we decided *Arlosorff v. National Collegiate Athletic Association*, 746 F.2d 1019 (1984), which was an attempt by a college tennis player to enjoin as state action, under § 1983, action taken by the NCAA with respect to his eligibility. We decided that the acts of the NCAA were not state action and construed *Jackson, Kohn, Blum,* and *Lugar* mentioned above. We state, at p. 1022, "It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action." So far as *Lugar* was concerned, we found that the clerk of the court and the sheriff involved in that case in the issuance of a writ of attachment were active participants with the creditors.[2]

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[2] The plaintiff depends on *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977), which declined to reconsider the earlier decision of *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974). We think *Perez* has no application here. In that case, two infant children were held involuntarily by two private children's homes. The homes held the children at

Applying those cases to the facts of this case, we are of opinion and come to the conclusion that the Tuckers were not state actors. The State of Maryland was not responsible for the specific conduct of which the plaintiff complains, that is, the physical child abuse itself. It exercised no coercive power over the Tuckers; neither did it encourage them. The case of foster children is not traditionally the exclusive prerogative of the State. Thus, under the analysis of *Blum*, 457 U.S. at 1004-1005, which synthesized the previous cases on the subject, the Tuckers should not be considered state actors. Our conclusion in this respect is consistent with our decision in *Arlosorff*, p. 1022, because the State of Maryland did not order or cause the action complained of and the function was not one reserved to the State.

This is a case, as was *Deshaney*, which arouses considerable and justifiable sympathy for the plaintiff, assuming he could prove his cause of action. But, as mentioned in *Deshaney*, the circumstances of the injury do not make the Tuckers state actors. Neither do they make those who might have intervened liable under § 1983. The Court in *Deshaney* noted that a State might provide for relief in just such cases, and, in that connection, we note that the plaintiff here has filed his parallel action in the state courts of Maryland, upon the merits of which we, of course, express no opinion.

The judgment of the district court is accordingly

AFFIRMED

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the instance of the City of New York and refused to return them to the mothers. We think the finding of the court that the action of the private homes for children in detaining the children, acting at the instance of the city, was state action, is simply not applicable here.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. JH-83-2857

CHARLES MILBURN, JR., A minor
by CHARLES B. MILBURN, his
father and next friend,

*Plaintiff,*

v.

ANNE ARUNDEL COUNTY
DEPARTMENT OF SOCIAL SERVICES, *et al.*

*Defendants.*

## MEMORANDUM OPINION

Plaintiff, Charles Milburn, Jr., by his father and next friend, Charles B. Milburn, has brought a claim under 42 U.S.C. § 1983 alleging defendants violated his "right to adequate supervision" and "right to live free from abuse" while in the foster care system of the Anne Arundel County Department of Social Services. Plaintiff also alleges pendent state law claims. Generally, the complaint alleges that plaintiff suffered neglect and severe physical and emotional abuse from 1971 to 1973 when he was assaulted, beaten and severely burned by his foster mother, Wendy L. Tucker, defendant. Also named as defendants are: Karl Tucker, plaintiff's foster father; the Anne Arundel County Department of Social Services ("DSS"); Esther Carpenter, Director of DSS; Elizabeth Tyler, a DSS supervisor; and Judy Finn Pylmyer (referred to simply as Judy Finn), a DDS caseworker. In addition, defendants North Arundel Hospital Association, Inc. and its employees, Sergio Alvarez, M.D., and Hazel Gent, as well as Baltimore City Hospitals and its employees, Eduardo Mazzi, M.D., Ophilia

Jones, M.D., and Maryland Hartge, are sued because they allegedly failed to report the foster mother's abuse to the authorities after treating plaintiff's injuries.

The case was referred to former Magistrate, now Judge, Frederic N. Smalkin for determination of non-dispositive motions and for recommendations as to dispositive motions, pursuant to 28 U.S.C. § 636(b)(1). Outstanding motions included a motion for reconsideration of the Court's denial of the request for a protective order by defendants Carpenter, Tyler and Finn, and the motions to dismiss of all the defendants. The Magistrate was of the opinion that all claims against every defendant must be dismissed.

Pending before this Court are plaintiff's exceptions to the Magistrate's Report and Recommendation.

**I. MAGISTRATE SMALKIN CORRECTLY RULED THAT FOSTER PARENTS KARL AND WENDY TUCKER DID NOT ACT UNDER COLOR OF STATE LAW.**

Plaintiff excepts to the finding that the defendant foster parents, Karl Tucker and Wendy Tucker, did not act under color of state law. Pursuant to the Court's finding, Magistrate Smalkin granted defendants' motion to dismiss under Rule 12(b)(6), finding that no claim satisfying the requirements of 42 U.S.C. § 1983 was stated against them.[1]

Plaintiff objects to the Court's purported reliance on *Player v. State of Alabama*, 400 F.Supp. 249 (M.D. Ala.) *aff'd*, 536 F.2d 1385 (5th Cir. 1976), suggesting that it is distinguishable from the case at bar. In *Player*, the state was sued by plaintiffs who claimed that child care homes operated by religious organizations, and to which the state's Department of Pensions and Security referred ne-

[1] In considering a claim under 42 U.S.c. § 1983, the Court must decide (1) whether the alleged conduct was committed by a person acting under color of state law, and (2) whether the conduct deprived a person of rights secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

glected children, had long-standing policies of racial discrimination. The issue in *Player* was whether the state, through licensing, regulation, assistance or any other action can be said to have sanctioned, fostered, encouraged or identified itself with the discriminatory admissions policies of the homes. *Id.* at 263. The court there held that the issuance of licenses to child care institutions operated by religious organizations did not make allegedly discriminatory practices of the institution's state action, and that the actions of the institutions were not attributable to the state under a public function theory.[2]

Plaintiff seeks to distinguish *Player* from the case at bar on its facts. The child care institutions in *Player* were subject to Alabama law providing for detailed regulation of most phases of the home's operations, but none of the regulations or licensing requirements there related to the admission practices of the homes. Plaintiff asserts that the thrust of the regulations in the present case is to produce proper foster parents.

Magistrate Smalkin correctly relied on *Player* by citing the case for the proposition that the foster parents' action is not attributable to the state on a "public function theory." Plaintiff incorrectly suggests that the Court relied on *Player* in finding that state action was not established by state regulation of a private entity where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity [such] that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1975).

The standard set out in *Jackson* requires more than the existence of statutes and regulations governing the acts

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[2] The finding of state action satisfying the requirements of § 1983 may be predicated on the finding that a private entity performs a function traditionally exclusively reserved to the state. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1975).

at issue. There must be a sufficient nexus between the laws and the foster parents' care of the plaintiff to make these actions state actions.[3] The Magistrate properly cited *Player* for the proposition that government regulation of the foster care program does not transform the provision of such care into an exercise of traditional sovereign power or, in this case, not dictate finding state action under a "public function" theory. *Id.* at 262.

Plaintiff objects to the Court's interpretation of the public function theory in which state action has been found where a private entity exercises powers "traditionally exclusively reserved to the state." *Jackson* at 352.

Plaintiff relies on *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1974), where the court found that private child care institutions were acting under color of state law when they took and retained plaintiff's children without consent and without benefit of a hearing or court order. The court there held that the homes were authorized agencies empowered to care for and have custody of children assigned to them by state and city officials and, as such, acted under color of state law for purposes of liability for civil rights violations. The court in *Duchesne* relied on the previous finding of the same court in *Perez*. In the interim period, the Supreme Court decided *Jackson*. The court in *Player* considered the relationship between *Perez* and *Jackson*, and concluded that *Perez* represented a "logical extension of pre-*Jackson* law, the current validity of the result of *Perez* is questionable." 400 F.Supp. 249 at 262.

The Magistrate correctly applied the standard set forth in *Jackson* to the facts in the present case in order to determine whether the Tuckers' acts could be considered

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[3] Absent the requirement of a sufficient nexus, every regulated entity's violation of state law would in effect be turned into state action, "with the curious result that the regulated entity's failure to follow regulations would subject him or the state to liability under § 1983." Magistrate's Report and Recommendation at 11.

as state actions under the public function theory. A state becomes responsible for a private party's act if the private party acts (1) in an exclusively state capacity, (2) for the state's direct benefit, and (3) at the state's specific behest. It acts in an exclusive state capacity when it exercises powers traditionally exclusively reserved to the state. *Jackson*, 419 U.S. 352; *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023, 1025 (1982); *Calvert v. Sharp*, 748 F.2d 861, 864 (4th Cir. 1984).

The care of children has not been a function traditionally exclusively reserved to the state. The enactment of statutes governing the provision of foster care does not transform the providing of such care itself into an exercise of traditional sovereign power. *Player, supra* at 262.

## II. MAGISTRATE SMALKIN CORRECTLY RULED THAT NORTH ARUNDEL HOSPITAL, SERGIO ALVAREZ AND HAZEL GENT DID NOT ACT UNDER COLOR OF STATE LAW

Plaintiff excepts to the finding that North Arundel Hospital, Sergio Alvarez and Hazel Gent did not act under color of state law. The magistrate found that the defendant hospital and its employees did not act under color of state law, and, consequently, that no claim under § 1983 is stated against them. The Court granted defendants' motion to dismiss under Rule 12(b)(6).

Plaintiff reasoned that state action can be established by state regulation of a private entity where there is a nexus between the state and the challenged action of the regulated entity such that the action of the latter may be fairly treated as that of the state itself. *See Jackson, supra* at 352. Plaintiff points out that in the present case there are Maryland statutes and regulations that govern and require the reporting of suspected child abuse. He asserts that there is a "sufficiently close" nexus (as required by *Jackson*) because plaintiff is complaining about the manner in which the hospital and its employees carried out their

statutory duty to report child abuse. In reporting child abuse, plaintiff contends that the defendant hospital and employees are exercising power possessed by virtue of state law and, in making the report, are immune from civil suit. Because the reporter is compelled to report and at the same time is protected by law, plaintiff asks the Court to conclude that the reporter is clothed in the authority of state law.

The Magistrate correctly applied the standard set out in *Jackson, supra* at 351, providing that state action can be established by state regulation of a private entity where there is a sufficiently close nexus between the state and the challenged action. The majority in *Jackson* found that the government licensing and regulation of a utility neither commanded, encouraged, nor sanctioned the complained of constitutional violations. By analogous reasoning, the Magistrate in the present case found that state action may not be predicated upon this theory, for to do so would, in effect, turn every regulated person's violation of state law into state action, subjecting him or the state to liability under § 1983.

**III. MAGISTRATE SMALKIN CORRECTLY RULED THAT NEGLIGENCE CLAIMS IN COUNTS III AND V BASED ON PENDENT JURISDICTION SHOULD BE DISMISSED.**

Plaintiff excepts to the dismissal of Counts III and V of the complaint which are negligence claims based on pendent jurisdiction. The Magistrate ruled that since there is no federal claim stated against defendants Wendy Tucker, Karl Tucker, North Arundel Hospital, Sergio Alvarez and Hazel Gent, pendent jurisdiction of state claims in negligence is inappropriate. The court properly held under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), that the pendent state claims should be dismissed.

## IV. MAGISTRATE SMALKIN RULED CORRECTLY IN FINDING THAT PLAINTIFF HAD NOT STATED A § 1983 CLAIM BASED UPON A VIOLATION OF A FEDERAL STATUTE.

Plaintiff excepts to the finding that he has not stated a § 1983 claim premised upon a violation of a federal statute. In reaching the determination that the plaintiff failed to state a cause of action premised upon a statutory violation, the Magistrate reasoned that plaintiff was not among the class of persons protected by 42 U.S.C. § 608(f) (1964), and therefore lacked standing to raise the claim. Plaintiff was placed in a foster home pursuant to a voluntary agreement, as opposed to a court order. The Magistrate found that by its terms, the statute provided federal matching funds to the states only on behalf of those "dependent children" who had been *removed* from their homes "as a result of *judicial determination* to the effect continuation therein would be contrary to the welfare of such child." 42 U.S.C. § 608(a); Magistrate's Report and Recommendation at 26.[4] The Court found that this was changed when the Adoption Assistance and Child Welfare Act of 1980 was enacted. The new statute included within the definition of "dependent child" those children removed from their homes pursuant to a voluntary placement agreement. 42 U.S.C. § 608(a) (P.L. 96-272).

Plaintiff asserts that children entering foster care pursuant to voluntary agreements fall under the statute by virtue of the general definition of "dependent child" provided in 42 U.S.C. § 606(a). The Magistrate found this argument to be unpersuasive because § 606(a) "pertains to the general Aid to Families with Dependent Children (AFDC) program, while the pertinent section, § 608(a), defines a narrower class of children eligible for AFDC foster care. Furthermore, by resort to the legislative history, the

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[4] Plaintiff, in the case at bar, was placed voluntarily in the foster home.

Magistrate found it clear that plaintiff was never covered by the statute, 42 U.S.C. § 608(f), which he invokes as a basis for his § 1983 claim.

Plaintiff asserts that the Magistrate's finding disregards 42 U.S.C. § 606(a) which stated at the time that "dependent child" was a needy child who has been deprived of parental support and who is under the age of eighteen (18) years. Plaintiff points to this basic definition in order to bring a voluntarily placed child under 42 U.S.C. § 608(f). The Court found that 608(a) did not include children subject to voluntary placement agreements until 1980 when § 608(a) was amended.[5] Contrary to this holding, plaintiff asserts that merely because the definition has been expanded upon or made clearer over the years cannot change the fact that a child subject to a voluntary placement agreement in 1971 fell under the general definition set out in § 606(a).

The Magistrate correctly ruled that plaintiff has failed to state a § 1983 claim based upon a violation of a federal statute. The Court correctly noted that it was not until the enactment in 1980 of the Adoption Assistance and Child Welfare Act (P.L. 96-272) that "dependent child" included children removed from their home "pursuant to a voluntary placement." 42 U.S.C. § 608(a) (1980); Magistrate's Report and Recommendation at 26-27. Thus, because plaintiff here was a voluntary placement, he was not within the class of persons protected by the statute when his rights were allegedly violated.

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[5] At the time of the events of this case, § 608(a) stated that the term "dependent child" shall include a child who was removed from the house of his parents as a result of judicial determination to the effect that continuation of such would be contrary to the welfare of the child. On June 17, 1980, the definition was amended to include children subject to voluntary placement agreements.

## V. THE MAGISTRATE RULED CORRECTLY THAT THERE WAS NO AFFIRMATIVE DUTY OF PROTECTION AT THE TIME OF THE ALLEGED CONSTITUTIONAL VIOLATIONS.

The Magistrate ruled that plaintiff's alleged constitutionally based § 1983 claims against defendants, Carpenter, Tyler, and Finn, in their individual capacities, are barred by good faith immunity, the issue being whether there exists an "affirmative duty of protection," and if such right presently exists, whether it was established clearly enough at the time of the alleged deprivation to avert the application of good faith immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Plaintiff argues that his right to an affirmative duty of protection was clearly established by 1971, and cites a series of cases involving intentional acts of police in violation of plaintiff's constitutional rights beginning in 1952.[6]

Plaintiff also contends that the line of cases leading up to *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), established the right by 1971. The Court in *Hall* found the right ultimate bodily security to exist in public school children under the disciplinary control of public school teachers. He concedes that defendants, Carpenter, Finn, and Tyler, did not actually assault the plaintiff, and that the line of cases upon which he relies all involved direct acts of brutality committed by *de jure* public officials. Nonetheless, plaintiff asserts that because defendants knew or should have known of the assaults, a jury should be allowed to determine the extent of their personal culpability in contributing to the § 1983 violation. Plaintiff cites *Spence v. Staras*,

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[6] *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952) (forcible use of stomach pump by police); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970) (reckless pistol shooting of suspect by police); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) (unprovoked beating of pretrial detainee by police); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) (use of excessive force against student by teacher).

507 F.2d 554 (7th Cir. 1974), for the proposition that to state a claim under § 1983, the complaint does not have to allege direct participation by defendants in the assaults.[7] Plaintiff contends under *Spence* that the inaction of the said defendants was of sufficient magnitude to constitute a deprivation of rights under § 1983.

The Magistrate concluded that plaintiff's alleged constitutionally based claim against Carpenter, Tyler, and Finn are barred by good faith relying on the Supreme Court's decision in *Harlow* as recently applied by the Fourth Circuit in *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). Under *Harlow*, government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional right of which a reasonable person would have known. 457 U.S. at 815-819. The Fourth Circuit in *Jensen* held that plaintiffs' claims were barred by the defense, available to state officials, of good faith immunity. The Magistrate found that the case at bar is controlled by the *Jensen* decision, and the defense of immunity is both patent and dispositive. Magistrate's Report and Recommendation at 31. In *Jensen*, the Court determined that the legal rights asserted by plaintiffs were not "clearly

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[7] "The present complaint, moreover, contains sufficient allegations regarding the defendant's knowledge of the beatings of the decedent to make the claim actionable under § 1983. Although the complaint does not allege direct participations by the defendants in the beatings, the complaint does allege more than an 'isolated incident' or more negligent supervision. The complaint here expressly alleges that the defendants know that the decedent was the target of assaults by fellow inmates, knew that he had been beaten on at least twenty prior occasions, and knew that he was nonverbal and unable to call for help or defend himself when attacked, and yet the defendants failed to protect the deceased. Assuming, as we must on a motion to dismiss, that the plaintiff can prove these allegations, the defendants' inaction was of sufficient magnitude to constitute a deprivation of rights under § 1983." *Id.* at 557.

established" in 1979, when the alleged abuse occurred, because judicial recognition of the affirmative duty of protection had not crystallized before 1980. 747 F.2d at 194-195.

The Magistrate rejected plaintiff's contention that *Jensen* may be distinguished from the case at bar on the ground that the plaintiffs in that case were not in state custody. *Jensen* stands for the proposition that, prior to 1980, the children *not in* the state's custody and control had no clearly established right to protection from the state. By applying *Jensen* to determine 1980 as the date on which the right to protection was established, the Magistrate failed to distinguish between custodial and noncustodial relationships with the state.[8] The Court in *Jensen*, therefore, never had before it the question of when the right to affirmative protection for someone *in custody* first became clearly established.

Where the state selects an individual from the public at large and places him in a position of danger, the state is enough of an active tortfeasor to charge it with an affirmative duty of protection. *Jensen, supra* at 194. Cases demonstrate that by 1974 it was reasonably foreseeable that failure to protect foster children placed in foster homes constituted a violation of plaintiff's Fourteenth Amendment rights. However, such a right was not clearly established until that time. *Gary W. v. State of Louisiana*, 437 F.Supp. 1208 (E.D. La. 1976) (If an individual adult or child, healthy or ill, is confined by the government for some reason other than the commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty, *id.* at 1216); *New York State Ass'n. for Retarded Children, Inc. v. Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973) (residents of state institutions were entitled to certain basic rights including

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[8] Unlike the plaintiff, the children at issue in *Jensen* were not in the custody of the state. 747 F.2d at 187-188.

the right to protection); *Woodhouse v. Virginia*, 487 F.2d 880 (4th Cir. 1973) (prison inmates under a known risk of harm from homosexual assaults by other inmates had a right to protection); and *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) (inmate in a state hospital was beaten to death by other inmates had a right to protection from the state).

In the present case, the Court is required to determine whether the right was established in 1971 when the alleged constitutional violations occurred. The Court finds that the asserted right not established clearly enough at the time of the alleged deprivation to avert the application of good faith immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).[9]

**VI. THE MAGISTRATE CORRECTLY GRANTED THE MOTION TO DISMISS IN FAVOR OF BALTIMORE CITY HOSPITALS.**

Plaintiff excepts to the finding that the *Jensen* case bars plaintiff's claim for the reasons set out in exception V above. The Magistrate ruled that *Jensen, supra*, directed that the asserted right to affirmative protection in this case did not arise until 1980.

Magistrate Smalkin was incorrect in relying on the non-custodial situation giving rise to the finding of an affirmative duty of protection in 1980 as found in *Jensen*. Nevertheless, because this Court finds that an affirmative duty of protection did not arise until 1974, the motion to dismiss was properly granted against Baltimore City Hospitals.

This Court is, therefore, not required to address plaintiff's exception to the finding that the pleadings fail

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[9] Having determined that a right to affirmative protection was not clearly established until 1974, the Court need not consider plaintiff's objections to the Magistrate's determination that DSS was a state agency at the time of the alleged harm.

to state a cause of action against Baltimore City Hospitals because of *Monell v. New York City Dept. of Social services*, 436 U.S. 658 (1978).

**VII. PLAINTIFF'S REQUEST TO AMEND.**

On September 18, 1987, plaintiff filed a motion for leave to amend his complaint. That complaint comes two years following the issuance of the Magistrate's Report and Recommendation, and at a time when plaintiff's counsel was aware that the Court's ruling on the Magistrate's recommendation would be forthcoming in the near future. Accordingly, plaintiff's motion for leave will be denied.

The Court will enter a separate Order.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Judge

Date: October 10/19/87

**ORDER**

In accordance with the Court's Memorandum of even date, it is this 19th day of October, 1987, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiff's motion for leave to amend BE, and the same hereby IS, DENIED;

2. That the recommendations of the Magistrate BE, and the same ARE, ADOPTED, although for different reasons as stated in the Court's Memorandum;

3. That plaintiff's complaint BE, and the same hereby IS, DISMISSED; and

4. That the Clerk mail copies of the foregoing Memorandum and of this Order to all counsel of record.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 88-3916

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CHARLES MILBURN, JR.,
*Plaintiff-Appellant,*

versus

ANNE ARUNDEL COUNTY, *et al,*
*Defendants-Appellees.*

FILED
APRIL 21 1989
U.S. Court of Appeals
Fourth Circuit

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ORDER

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We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Chapman and Judge Wilkins.

/s/ H.E. Widener, Jr.
For the Court

A True Copy, Teste:
John M. Greacon, Clerk
By Carter Abrahams
Deputy Clerk

## FOSTER PARENTS' AGREEMENT

In becoming foster parents of any child placed with us by the A.A.Co. Dept. Social Services local welfare department, we understand and agree that the custody and control of the child at all times remains in the departm nt. Specifically, we understand and agree:

That the department will provide board, medical care, clothing and supervision of the child during his placement;

That visiting and communication between the child and his own family will be arranged by the department;

That the length of time a child will remain in our home cannot be known at the time the child is placed with us;

That the department reserves the right to remove any child at its discretion;

That no child is to be moved from our home without the written permission of the department;

That we reserve the right to ask the department to take back any child;

That we will take no action for adoption or guardianship of any child placed with us by the department without the department's consent in writing.

Karl Thomas Tucker
Foster Father

Wendy Lee Tucker
Foster Mother

Local Welfare Department
Anne Arundel Co.
Social Services

4-29-71
Date

Lennis Toleman
Foster Home Worker

SDPW #851 (Rev. 4/65)